ORDERED.

Dated: April 14, 2021

Karen S. Jennemann
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION
www.flmb.uscourts.gov

In re Jose Volpato and Milena R. Volpato, Debtors.	)	Case No. 6:20-bk-04544-KSJ Chapter 7
Mandala Management Corp., Plaintiffs, vs. Jose Volpato, Defendant.	)	Adversary No. 6:20-ap-00112-KSJ

ORDER PARTIALLY GRANTING AND
PARTIALLY DENYING MOTION TO DISMISS

Debtor and Defendant, Jose Volpato, was the Chief Financial Officer and a part owner of Lucy's Bazar Brazil Inc., which sold franchise opportunities under the name Vitaflex. Plaintiff, Mandala Management Corp., invested over $900,000 to obtain the

Vitaflex Master Franchise for South Florida[1] and agreed to open three Vitaflex stores selling Vitaflex vitamins and supplements. Plaintiff quickly was dissatisfied with the franchises, and state court litigation ensued[2] all based on allegedly fraudulent misrepresentations by Defendant and others associated with the franchise.[3]

After Volpato filed this bankruptcy case,[4] Plaintiff filed its Original Complaint[5] arguing its investment is not dischargeable under Bankruptcy Code §§ 523(a)(2)(A) and 523(a)(6).[6] In response to an earlier Motion to Dismiss,[7] Plaintiff filed an Amended Complaint[8] adding a new count under § 523(a)(2)(B) of the Bankruptcy Code.

All three counts in the Amended Complaint focus on the Defendant's alleged false misrepresentations about the profitability and prospects for success of the Vitaflex franchise opportunities. Defendant has filed a renewed Motion to Dismiss[9] asserting none of the counts state a claim primarily because Plaintiff has pled no explicit statement or representation personally made by Volpato. After considering the parties'

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[1] Exhibit C of Plaintiff's Amended Complaint; Doc. No. 6-3.
[2] On February 12, 2016, Mandala Management Corp. filed a state court action against Jose Volpato, Ricardo Rocha, and Lucy's Bazar Brazil Inc., in the Ninth Judicial Circuit, in and for Orange County, Florida, Case No. 2016-CA-001701-O.
[3] Exhibit D of Plaintiff's Amended Complaint; Doc. No. 6-4.
[4] On August 12, 2020, Defendant filed a Voluntary Petition for Bankruptcy under Chapter 7 in the United States Bankruptcy Court, Middle District of Florida, Orlando Division.
[5] Doc. No. 1.
[6] All references to the Bankruptcy Code refer to 11 U.S.C. § 101 *et seq.*
[7] Doc. No. 5.
[8] Doc. No. 6.
[9] Doc. No. 8. Plaintiff filed an Opposition to the Motion to Dismiss. Doc. No. 9. Defendant filed a reply to Plaintiff's Response and Memorandum of Law in Opposition to Motion to Dismiss Amended Complaint. Doc. No. 10.

pleadings and positions, the Motion to Dismiss is denied as to Counts One and Two and is granted as to Count Three.

Defendant's Motion to Dismiss is brought under Rule 12(b)(6) of the Federal Rules of Civil Procedure[10] providing that before an answer is filed a defendant may seek dismissal of a complaint if the complaint fails to state a claim. Disposition of a motion to dismiss under Rule 12(b)(6) focuses only upon the allegations in the complaint and whether those allegations state a claim for relief. In reviewing a motion to dismiss, courts must accept the allegations as true and construe them in the light most favorable to the plaintiff.[11] Dismissal is appropriate under Rule 12(b)(6) if the plaintiff "fails to articulate claims with sufficient clarity to enable defendants to properly frame a response."[12] "While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do."[13]

As to Counts One and Two, brought under §§ 523(a)(2)(A)and (B) of the Bankruptcy Code, the Court finds Plaintiff states a plausible claim for relief. Section 523(a)(2)(A) of the Bankruptcy Code provides a debtor cannot discharge a debt obtained by "false pretenses, a false representation, or actual fraud." Section

[10] Rule 12(b)(6) is made applicable in adversary proceedings by virtue of Bankruptcy Rule 7012.
[11] *Financial Security Assur., Inc. v. Stephens, Inc.*, 450 F.3d 1257, 1262 (11th Cir. 2006).
[12] *Cream v. McIver*, Case No. 2:15-cv-113-FtM-29CM, 2015 WL 2168946 at *1 (May 8, 2015 M.D. Fla. 2015). *See also Estate of Bass v. Regions Bank, Inc.*, 947 F.3d 1352, 1358 (11th Cir. 2020). It is not the court's responsibility to parse out unclear allegations. A court may instruct counsel to replead the case – even if the other party does not move the court to strike the pleading.
[13] *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555, 127 S. Ct. 1955, 1964-65, 167 L. Ed. 2d 929 (2007) (internal citations omitted).

523(a)(2)(B) merely adds that the misrepresentation appears in writing and address the debtor's or an insider's financial condition.

Accepting the allegations in the Amended Complaint as true and viewing the allegations in the light most favorable to the Plaintiff, it is plausible Defendant directly or indirectly intended to deceive Plaintiff by making inaccurate statements about the legitimacy of the franchise, the profitability, and prospects of success for Vitaflex, its products, and its franchises. Of course, Plaintiff ultimately may not prove the allegations and Defendant may dispute the allegations in his answer, but Plaintiff has stated a claim in Counts One and Two.

Further, the Court finds Count Two of the Amended Complaint was timely filed and relates back to the filing of the Original Complaint. Federal Rule of Civil Procedure 15, made applicable to bankruptcy proceedings by Federal Rule of Bankruptcy Procedure 7015, governs the amendment of pleadings. Under Federal Rule of Civil Procedure 15(c), an amendment to a pleading may be allowed if it "relates back to the date of the original pleading." An amendment relates back when "the amendment asserts a claim or defense that arose out of the conduct, transaction, or occurrence set out—or attempted to be set out—in the original pleading." Relation back to the original pleading "depends on the existence of a common 'core of operative facts' uniting the original and newly asserted claims."[14] "The critical issue in Rule 15(c)

[14] *In re Barber*, No. 6:03BK11735 ABB, 2006 WL 2398775, at *5 (Bankr. M.D. Fla. Aug. 10, 2006).

determinations is whether the original complaint gave notice to the defendant of the claim now being asserted."[15]

In Count Two, Plaintiff alleges the same general facts provided in the Original Complaint. Plaintiff alleges Defendant inaccurately represented the Vitaflex franchise, its profitability, its products, and its success to induce Plaintiff to enter into the franchise agreement. Count Two relies on the same general misrepresentations initially pled and adds that certain representations were in writing and addressed the debtor's or an insider's financial condition. Both Counts One and Two involve the same common core of operative facts and should relate back to the Original Complaint.[16] Count Two is deemed timely filed.

As to Count Three, however, the Court grants the Motion to Dismiss because the Plaintiff failed to articulate a claim for relief under § 523(a)(6) of the Bankruptcy Code. The dispute between the Plaintiff, the Defendant, and those associated with the Vitaflex franchise involves whether the Plaintiff was misled into investing in the business based on lies and false financial information. Under § 523(a)(6) a debt is excepted from discharge if a plaintiff proves the debtor/defendant: 1) deliberately and intentionally, 2) injured plaintiff or plaintiff's property, by 3) a willful and malicious act.[17] "[A]n injury is willful when the debtor commits an intentional act for the purpose

[15] *Id.* (quoting *Moore v. Baker,* 989 F.2d 1129, 1131 (11th Cir.1993)).
[16] The deadline for a creditor, such as Plaintiff, to file a complaint objecting to the discharge or dischargeability of a debt was November 16, 2020. Doc. No. 4 in the Main Case No. 6:20-bk-4544. The Original Complaint containing Count One was filed on the last possible day, November 16, 2020. The Amended Complaint, containing Count Two, was filed slightly later on December 30, 2020. Therefore, it is critical that the added complaint relate back to the date of the original filing.
[17] *In re Howard*, 261 B.R. 513, 520 (Bankr.M.D.Fla.2001).

of causing injury or which is substantially certain to cause injury."[18] An act that is merely reckless is not a "willful act" for § 523(a)(6).[19] An act is malicious if it is "wrongful and without just cause or excessive even in the absence of personal hatred, spite or ill will."[20] The Supreme Court clarified that nondischargeability of a debt under § 523(a)(6) takes a deliberate or intentional injury, not merely a deliberate or intentional act that leads to injury.[21] The established law is clear that a debtor must commit an intentional tort or tort-like conduct directed against the claimant or his property for a court to find a debt nondischargeable under Section 523(a)(6).[22]

Plaintiff here alleges Defendant intentionally made materially false representations substantially certain to cause willful and malicious injury to Plaintiff. But no type of intentional tort or malicious conduct actually is alleged. Plaintiff alleges fraud and lies, and a business deal gone wrong, but no type of tortious, willful, or malicious conduct that would support a claim under § 523(a)(6). Count Three is dismissed.

Accordingly, it is

ORDERED:

1. The Motion to Dismiss (Doc. No. 8) is partially granted and partially denied.
2. As to Counts One and Two, the Motion to Dismiss is denied.

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[18] *Id. See also*, *In re Walker*, 48 F.3d 1161, 1165 (11th Cir.1995).
[19] *In re Howard*, 261 B.R. 513, 520 (Bankr.M.D.Fla.2001).
[20] *In re Howard*, 261 B.R. 513, 520 (Bankr.M.D.Fla.2001) (citing Walker, 48 F.3d at 1163–64).
[21] *Kawaauhau v. Geiger*, 523 U.S. 57, 57–58, 118 S.Ct. 974, 140 L.Ed.2d 90 (1998) (emphasis added).
[22] *In re Nofziger*, 361 B.R. 236, 243 (Bankr. M.D. Fla. 2006).

3. Count Two shall relate back to the filing of the Original Complaint and is deemed timely filed.
4. As to Count Three, the Motion to Dismiss is granted.
5. Count Three is dismissed.
6. Defendant must file an Answer to the Amended Complaint by **May 7, 2021**.

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Attorney, Robert B. Branson, will serve a copy of this order on interested parties who are non-CM/ECF users and file a proof of service within 3 days of entry of the order.